



November 4, 1999

Ms. Bonnie Lee Goldstein  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.  
1700 Bank One Center  
1717 Main Street  
Dallas, Texas 75201-4335

OR99-3131

Dear Ms. Goldstein:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129188.

The City of McKinney (the "city"), which you represent, received a request for the personnel file, including records of commendations, reprimands, awards bestowed, disciplinary suspensions, state approved classes attended, and the date of hire, of a recently resigned city police investigator. You have provided information responsive to this request to this office for review.<sup>1</sup> The requestor also seeks copies of "ethics policies" and the date those policies were adopted. You did not submit this information to this office or raise an objection to the release of this information. We assume that you have released the requested policies.

You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117 and 552.119 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Texas courts recognize the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Public Information Act. Open Records Decision No. 549 at 4 (1990). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

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<sup>1</sup>You indicate that you do not consider information obtained during the hiring process to be responsive to this request, and therefore have not submitted such information for our review. If such information is maintained in the personnel file of the subject individual, it is responsive and must be released to this requestor Gov't Code. §§552.301, 552.352.

<sup>2</sup>You also raise section 552.111, but as you provide no argument in support of this exception, it is not addressed.

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The informer's privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990). Once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 at 2 (1978). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. See Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). Also, since the informer's privilege serves to protect the flow of information to a governmental body and does not serve to protect a third person, this privilege, unlike other section 552.101 claims, may be waived by the governmental body. Open Records 549 (1990).

You have highlighted certain names in the submitted information, apparently asserting the informer's privilege for the identities of these individuals. However, you have failed to comply with section 552.301 by clearly labeling the information to indicate which exception applies to the information. Most of the identified individuals implicated here gave statements that do not pertain to criminal activity. Moreover, the identities of these individuals is known to the subject of the investigation. As the identity of such individuals is not protected by the informer's privilege, this information may not be withheld.

Section 552.101 also encompasses the common-law right to privacy. The common-law right to privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102 of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for*

*Freedom of the Press*, 489 U.S. 749 (1989). Such information is protected by the common law right of privacy *Id.* We have marked the submitted information to indicate that which must be withheld as protected by common-law privacy.

Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

The submitted documents include information excepted under section 552.130 of the Government Code. This section governs the release and use of information obtained from motor vehicle records, and provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold driver's license numbers, VIN numbers, and license plate numbers pursuant to section 552.130. We have marked this information.

The submitted documents include records subject to V.T.C.S. art. 4495b, § 5.08, the Medical Practices Act (the "MPA"). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). Access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Section 5.08(j)(3) of the MPA requires that any subsequent release of medical records be consistent with the purposes for which a

governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the information in the submitted documents that is subject to the MPA. The city may only release this information in accordance with the MPA.

The submitted documents also contain information that may be excepted from public disclosure by section 552.117 of the Government Code, which reads in relevant part:

Information is excepted from the [public disclosure] requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number, or that reveals the following person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;
- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024 [.]

Because the purpose of this exception is to protect public officials and employees from being harassed while at home, a peace officer's pager number must also be withheld from disclosure. Open Records Decision No. 596 at 5 (1988). The subject employee is apparently a former peace officer. Section 552.117(1) requires you to withhold information pertaining to a former employee who requested that this information be kept confidential under section 552.024. Information may not be withheld under 552.117(1) if the former employee elected non-disclosure after this request for information was made. Open Records Decision No. 622 (1994). If this former employee is currently a peace officer, section 552.117(2) requires the information to be withheld irrespective of his election under section 552.124 of the Government Code. We have marked a representative sample of the information in the submitted documents to indicate the information that is or may be subject to section 552.117.

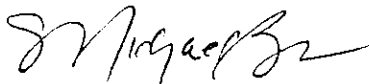
Section 552.119 of the Government Code prohibits the release of a photograph that depicts a peace officer as defined by article 2.12 of the Code of Criminal Procedure except in certain circumstances. However, the submitted information does not include such a photograph.

You assert that the responsive information is part of an internal investigation file. You contend that the information is excepted from disclosure by section 552.108 of the Government Code. However, where no criminal prosecution results from an investigation of a police officer for alleged misconduct, section 552.108 is inapplicable. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.--El Paso 1992, writ denied); Open Records Decision No. 350 (1982). Apparently, the submitted files did not involve an investigation that resulted

in a criminal prosecution. Moreover, you have not demonstrated how the section 552.108 applies to the subject information. We therefore conclude that the city may not withhold those files from public disclosure based on section 552.108 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Burns".

Michael J. Burns  
Assistant Attorney General  
Open Records Division

MJB/nc

Ref: ID# 129188

Encl. Submitted documents

cc: Mr. Jacque Hilburn  
McKinney Courier-Gazette  
P.O. Box 400  
McKinney, Texas 75070  
(w/o enclosures)